No. 04-1084

FILED
SEP 9 - 2005
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

ALBERTO R. GONZALES,
Attorney General, et al.,

Petitioners,

v.

O CENTRO ESPIRITA BENEFICIENTE
UNIÃO DO VEGETAL, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Tenth Circuit**

BRIEF OF LIBERTY LEGAL INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

KELLY SHACKELFORD
Counsel of Record
HIRAM S. SASSER III
JONATHAN M. SAENZ
Liberty Legal Institute
903 East 18th Street, Suite 230
Plano, Texas 75074
(972) 423-3131
(972) 423-6570 (FAX)
Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
I. THE UNITED NATIONS CONVENTION ON PSYCHOTROPIC SUBSTANCES MAY NOT BE USED TO BURDEN FREEDOM OF RELIGIOUS EXPRESSION BECAUSE THE TREATY IS SUBJECT TO THE RELIGIOUS FREEDOM RESTORATION ACT	4
A. The Religious Freedom Restoration Act supersedes the Convention on Psychotropic Substances because the RFRA was passed last-in-time	5
B. The Religious Freedom Restoration Act applies to the Convention on Psychotropic Substances because the RFRA expressly applies to all other rules of general applicability, regardless of when the rules were passed	6
C. The Government's reliance on *Charming Betsy* is misplaced	7
II. RFRA IS CONSISTENT WITH THE INTERNATIONAL LEGAL OBLIGATIONS OF THE UNITED STATES	8

TABLE OF CONTENTS – Continued

Page

III. EVEN IF THE CONVENTION CAN BE USED AS A POTENTIAL COMPELLING GOVERNMENTAL INTEREST, THE GOVERNMENT WOULD NOT BE JUSTIFIED IN BURDENING THE FREE EXERCISE OF RELIGION ON THE BASIS OF THE CONVENTION 10

A. Two religious groups engaging in a similar practice that the government would argue creates the same "harm" are being treated differently 10

B. There is no compelling interest if the government restricts the religious practice of hoasca but allows activity that causes the same "harm" 11

CONCLUSION 12

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993) 11

City of Boerne v. Flores, 521 U.S. 507 (1997) 4

Employment Division v. Smith, 494 U.S. 872 (1990) 12

Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993) 7

Missouri v. Holland, 252 U.S. 416 (1920) 9

Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) 7

Reid v. Covert, 354 U.S. 1 (1957) 6

The Paquete Habana, 175 U.S. 677 (1900) 7

Whitney v. Robertson, 124 U.S. 190 (1888) 6

Wisconsin v. Yoder, 406 U.S. 205 (1972) 11, 13

INTERNATIONAL CASES

Ambatielos Case (Greece v. U.K.), 1951, 12 R.Int'l Arb. Awards 91 2

Interhandel (Switz. v. U.S.), 1959 I.C.J. Rep. 5, 27 (Mar. 21) 1

STATUTES

21 U.S.C. § 801a *et seq.* 5, 6

22 U.S.C. § 6401 8

42 U.S.C. §§ 2000bb *et seq.* 4, 6

U.S. Const. art. VI, cl. 2 5

TABLE OF AUTHORITIES – Continued

Page

TREATIES

International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 9

United Nations Convention on Psychotropic Substances, *opened for signature* Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175 4

OTHER AUTHORITIES

HON. JACK BROOKS, CHAIRMAN, COMMITTEE ON THE JUDICIARY; RELIGIOUS FREEDOM RESTORATION ACT OF 1993 (RFRA), H.R. REP. NO. 103-88 (1993) 7

Gerald L. Neuman, *The Global Dimension of RFRA*, 14 Const. Comment. 33 (1997) 9

Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948) 9

INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Liberty Legal Institute is a non-profit law firm dedicated to the preservation of first amendment rights and religious freedom. In its commitment to the protection of religious liberty of all faiths, the Institute represents religious institutions and individuals across the country. The Liberty Legal Institute is increasingly aware that international law is playing a role in decisions by the United States Supreme Court in a diverse array of issues, including issues regarding domestic public policy. While international law has played a distinct role in our jurisprudence since the formation of this Nation, it is important to recognize that our domestic jurisprudence superbly serves this Nation, its citizens and visiting foreign nationals.

The customary international rule of exhaustion of local remedies compels federal courts to first exhaust all domestic legal analysis before engaging in the application of foreign sources of law. *See Interhandel* (Switz. v. U.S.), 1959 I.C.J. Rep. 5, 27 (Mar. 21) ("The rule that local remedies must be exhausted before international proceedings may be instituted is a well-established rule of customary international law."). *Amicus* believes very strongly that our national sovereignty depends upon federal courts restraining themselves to bifurcate analysis in all cases where international law may be seen as providing helpful guidance. Such bifurcation of analysis

---

[1] The parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, none of the counsel for the parties authored this brief in whole or in part and no one other than *amicus* or its counsel contributed money or services to the preparation and submission of this brief.

protects the integrity of our judicial system and highlights exactly how the Court is employing international law.

"Local remedies" includes "the whole system of legal protection, as provided by municipal law," including "the use of procedural facilities which municipal law makes available to litigants." *Ambatielos Case* (Greece v. U.K.), 1951, 12 R.Int'l Arb. Awards 91, 120, 122. Thus, it is incumbent upon this Court to resort to international legal analysis only when all domestic legal analysis has been fully exhausted, bifurcating its analysis to purely domestic analysis first, then international legal analysis. This case presents the Court with an opportunity to clearly define the application of an international legal source as it affects domestic legislation.

While the social utility of relying upon international sources in various areas of the law, such as domestic constitutional jurisprudence, remains controversial, it is the position of *amicus* that this Court should at least put lower courts and practitioners on notice of exactly how international law may be applied. Bifurcation will ensure the consistency the legal community has come to expect from the judiciary while not foreclosing the application of international law in appropriate circumstances.

SUMMARY OF THE ARGUMENT

The United States Government may not use the United Nations' Convention on Psychotropic Substances (Convention) as a basis for limiting the freedom of religious expression. First, the Convention does not even apply to the hoasca tea at issue in this case. Second, the Religious Freedom Restoration Act of 1993 ("RFRA")

supersedes the Convention by being last-in-time and by explicitly prohibiting federal law from violating the RFRA.

The Religious Freedom Restoration Act itself is the United States' expression of the global consensus that the freedom of religious expression remain inviolate. Both domestic and international law repeatedly emphasize the importance of protecting the freedom of religious expression. The United States is compelled to uphold those international treaties, such as the International Covenant on Civil and Political Rights ("ICCPR"), which demand that the freedom of religious expression be promoted.

Even if the Convention on Psychotropic Substances can be used as a compelling governmental interest, the Government would not be justified in burdening the free exercise of religion on the basis of the Convention. The Convention allows for religious-use exemptions, such as is employed with peyote. The hoasca used by *O Centro Espirita Beneficiente União do Vegetal*, however, is kept from this exemption solely because it is made from plants that are native to Brazil, not the United States. There is, per se, no compelling governmental interest. Not allowing an exemption for the limited, religious use of hoasca cannot be truly "compelling" for the government when it allows an exemption for the religious use of peyote.

ARGUMENT

I. THE UNITED NATIONS CONVENTION ON PSYCHOTROPIC SUBSTANCES MAY NOT BE USED TO BURDEN FREEDOM OF RELIGIOUS EXPRESSION BECAUSE THE TREATY IS SUBJECT TO THE RELIGIOUS FREEDOM RESTORATION ACT.

The Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.* ("RFRA"), prohibits even rules of general applicability from "burden[ing] a person's exercise of religion" unless the Government can demonstrate that the burden both "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest."[2] Because the United Nations Convention on Psychotropic Substances, *opened for signature* Feb. 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175 is a "rule of general applicability" resulting in the burdening of religious expression, the RFRA explicitly applies.

Because the Convention is subject to the RFRA, the mere existence of the Convention may not be used as a compelling governmental interest to fulfill the demands of the RFRA. If the Government could claim a compelling governmental interest in a treaty's burdening a person's freedom of religious expression merely because the treaty exists, then the first prong of the RFRA test would be meaningless. Any statute, merely by virtue of having been enacted by Congress, would then become a "compelling governmental interest" and the RFRA would be severely

[2] In *City of Boerne v. Flores*, 521 U.S. 507 (1997), this Court declared the RFRA unconstitutional only as applied to the States.

hindered in its ability to protect religious liberty from offending statutes.

Further, because the Convention is not self-executing, it is merely the implementing legislation that can serve as a compelling interest, rather than the Convention itself. *See* 21 U.S.C. § 801a(2) ("The Convention is not self-executing, and the obligations of the United States thereunder may only be performed pursuant to appropriate legislation.").

This Court should bifurcate its analysis. Assuming that the Convention and its implementing legislation even apply to hoasca at all,[3] both are subject to RFRA, which is later enacted and which applies to all federal law. Under normal rules of statutory construction, when two statutes or a statute and treaty clearly conflict, the one passed last-in-time prevails.

A. The Religious Freedom Restoration Act supersedes the Convention on Psychotropic Substances because the RFRA was passed last-in-time.

Under the Supremacy Clause, the RFRA, the Convention and the Convention's implementing legislation are the "supreme law of the land." U.S. Const. art. VI, cl. 2. As the Government argues that the Convention should be interpreted, the Convention burdens the free exercise of religion of people who use non-exempted psychotropic substances in a religious manner. The RFRA, however,

[3] In fact, the Convention has no application to hoasca. *See* Brief of Respondents, section II B; Brief of *Amicus Curiae* Dr. John H. Halpern, et al.

mandates that the free exercise of religion may not be burdened without a compelling governmental interest and a showing that the burden is the least restrictive means of furthering the interest. This conflict may be settled by using the last-in-time rule.

Traditionally, the last statute that was passed supersedes any prior, conflicting statutes or treaties. *See Reid v. Covert*, 354 U.S. 1, 18 (1957) (plurality opinion) ("an Act of Congress . . . is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null."); *see also Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (when a treaty and a federal statute conflict, "the one last in date will control the other."). In this case, the RFRA, passed in 1993, controls the Convention to the extent of any conflict, because the Convention was implemented in 1978 with 21 U.S.C. § 801a *et seq*.

B. The Religious Freedom Restoration Act applies to the Convention on Psychotropic Substances because the RFRA expressly applies to all other rules of general applicability, regardless of when the rules were passed.

The RFRA states, "[t]his Act applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act. [. . .] Federal statutory law adopted after the date of the enactment of this Act is subject to this Act unless such law explicitly excludes such application by reference to this Act." 42 U.S.C. § 2000bb-3. RFRA is "all-inclusive" and specifically governs over all law enacted

before or after RFRA. *See* HON. JACK BROOKS, CHAIRMAN, COMMITTEE ON THE JUDICIARY; RELIGIOUS FREEDOM RESTORATION ACT OF 1993 (RFRA), H.R. REP. NO. 103-88, at 16 (1993) (finding that the RFRA defines governmental activity as "all-inclusive," so that "all governmental actions (law or action to implement a law) which have a substantial external impact on the practice of religion" would require a "compelling justification to burden religious exercise")).

Nothing in the Convention on Psychotropic Substances or its implementing legislation specifically exempts it from the Religious Freedom Restoration Act. Therefore, the Convention is subject to the RFRA and the RFRA controls.

C. The Government's reliance on *Charming Betsy* is misplaced.

The Charming Betsy holds that "an act of Congress ought never be construed to violate the law of nations if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804). However, the "law of nations" as stated in 1804 is merely what modern courts identify today as "customary international law." *See, e.g., Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993). First, at issue here is a treaty, not customary international law. Second, if a conflict arises between customary international law and a federal statute, a domestic court must give effect to the statute. *See The Paquete Habana*, 175 U.S. 677, 700 (1900) (where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations."). A court may

only resort to customary international law when there is no treaty or domestic legislation governing the issue. Because that is not the case here, there is no basis for the government's invocation of customary international law.[4]

II. RFRA IS CONSISTENT WITH THE INTERNATIONAL LEGAL OBLIGATIONS OF THE UNITED STATES.

Both in domestic law and international law, there is a consensus that the freedom of religious expression must be preserved inviolate. In 22 U.S.C. § 6401, Congress made a finding of fact that "[t]he right to freedom of religion undergirds the very origin and existence of the United States. . . . Freedom of religious belief and practice is a universal human right and fundamental freedom articulated in numerous international instruments, including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Helsinki Accords, the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, the United Nations Charter, and the European Convention for the Protection of Human Rights and Fundamental Freedoms."

In the statute, Congress affirmed that the freedom of religious expression is nearly universally recognized and should be protected as a cornerstone of the United States. Article 18 of the International Covenant on Civil and Political Rights, for instance, states, "[e]veryone shall have

[4] This is exactly why bifurcation of analysis is so important. Bifurcation, required under international law, allows the Court to avoid unnecessarily inserting international law into purely domestic issues.

the right to freedom of thought, conscience and religion. This right shall include freedom to . . . manifest his religion or belief in worship, observance, practice and teaching." International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171. Similarly, Article 18 of the Universal Declaration of Human Rights declares, "[e]veryone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948). The United States had an obligation under the ICCPR Article 18 to enact the RFRA. In addition, RFRA itself is but an expression of the global recognition of the importance of religious freedom.

In fact, Article 18 of the ICCPR justified Congress in enacting the RFRA and having it apply to the federal government, the states and their political sub-divisions. *See* Gerald L. Neuman, *The Global Dimension of RFRA*, 14 Const. Comment. 33, 53 (1997) (ICCPR Article 18 "would support a verbatim reenactment of [RFRA] if Congress so chose"); *see also Missouri v. Holland*, 252 U.S. 416, 434-35 (1920). *Amicus* believes that had this Court been given an opportunity to consider the argument that the RFRA is constitutional as an enactment of Congress' duty under the ICCPR, then the RFRA would have been upheld as applied to the states. The elimination or marginalization of RFRA would do great harm to the leadership of the United States in preserving religious freedom for the world and be inconsistent with international law.

III. EVEN IF THE CONVENTION CAN BE USED AS A POTENTIAL COMPELLING GOVERNMENTAL INTEREST, THE GOVERNMENT WOULD NOT BE JUSTIFIED IN BURDENING THE FREE EXERCISE OF RELIGION ON THE BASIS OF THE CONVENTION.

The Government maintains that allowing *O Centro Espirita Beneficiente União do Vegetal* to employ small amounts of hoasca tea for a religious ceremony would hinder the compelling governmental interest of maintaining a position of global leadership in the war on drugs. The Convention does not even apply to hoasca, as explained in the church's brief section II.B. and in the *amicus* brief of Dr. John Halpern. The government's argument that the Convention does apply is mistaken, but the relevant point here is that the government's argument is equally applicable to all plants and plant products, peyote and hoasca alike. Either the Convention does not apply, or it applies to peyote too and the government has created a large exception.

A. Two religious groups engaging in a similar practice that the government would argue creates the same "harm" are being treated differently.

Article 32, paragraph 4 of the Convention states, "[a] State on whose territory there are plants growing wild which contain psychotropic substances from among those in Schedule I and which are traditionally used by certain small, clearly determined groups in magical or religious rites, may, at the time of signature, ratification or accession, make reservations concerning these plants . . . " Even if the Convention applied to peyote, religious use of peyote

would remain outside the Convention because the United States made a reservation under this clause. The necessity of this reservation is contested, but whether or not the reservation was necessary, the United States cannot satisfy its burden of justifying the discrimination between peyote and hoasca. Unfortunately for members of *O Centro Espirita Beneficiente União do Vegetal*, the plants that are used to make hoasca are not indigenous to the United States, and the government relies on this fact to claim that no reservation was or could have been made for their use as was made for peyote.

Assuming *arguendo* the Convention applies to both peyote and hoasca, the government is essentially left with the problem of giving a religious practice of one group an exemption while denying that very same exemption to another group engaging in a similar practice that presents no different or greater dangers.

B. There is no compelling interest if the government restricts the religious practice of hoasca but allows activity that causes the same "harm."

In *Wisconsin v. Yoder*, this Court expounded upon what constitutes a compelling governmental interest by saying that "[o]nly those interests of the highest order and not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). Moreover, "[w]here government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling." *Church of Lukumi Babalu Aye v. City of*

Hialeah, 508 U.S. 520, 546-47 (1993).[5] Allowing peyote to be used for religious ceremonies while banning hoasca does not rise to the level of a compelling interest.

The harm, if any, from peyote and hoasca is the same. If banning the religious use of hoasca were truly "compelling," the religious use of peyote would have to be banned as well. Yet peyote is permitted while hoasca is prohibited, without any compelling interest or even rational reason for so doing. Thus, even if the Court determines the Convention applies, the very large exception provided for peyote not only destroys the government's compelling interest, but would also destroy the government's case under the more deferential test in *Employment Division v. Smith*, 494 U.S. 872 (1990).

CONCLUSION

The Religious Freedom Restoration Act applies to the government's attempt to burden the religious freedom of the members of *O Centro Espirita Beneficiente União do Vegetal* because the RFRA states that it applies to laws of general applicability, such as the Convention on Psychotropic Substances, and because it was passed after the

[5] ("It is established in our strict scrutiny jurisprudence that "a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Florida Star* v. *B. J. F., supra*, at 541-542 (SCALIA, J., concurring in part and concurring in judgment) (citation omitted). See *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105, 119-120, 116 L. Ed. 2d 476, 112 S. Ct. 501 (1991). Cf. *Florida Star* v. *B. J. F., supra*, at 540-541; *Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 104-105, 61 L. Ed. 2d 399, 99 S. Ct. 2667 (1979); *id.*, at 110 (REHNQUIST, J., concurring in judgment)").

Convention was implemented. Because the RFRA applies, only a compelling governmental interest will allow the burdening of religious freedom by banning hoasca use. The Convention itself cannot serve as a compelling interest because allowing the Convention to be its own compelling interest would destroy the compelling interest test in the RFRA. The Convention also does not rise to the level of a compelling interest as defined in *Yoder*. Instead, the United States has a strong interest in preserving religious freedom consistent with international law. Even if the Convention applied in this case, a government interest cannot be compelling as to hoasca if the government exempts peyote.

Respectfully submitted,

KELLY SHACKELFORD
Counsel of Record
HIRAM S. SASSER III
JONATHAN M. SAENZ
Liberty Legal Institute
903 East 18th Street, Suite 230
Plano, Texas 75074
(972) 423-3131
(972) 423-6570 (FAX)
Counsel for Amicus Curiae